law from this Court at the time of Magleby's direct appeal was that the Eighth Circuit had already applied these long-established principles in nearly identical cross-burning cases. *United States v. McDermott*, 29 F.3d 404 (8th Cir. 1994); *United States v. Lee*, 6 F.3 1297 (8th Cir. 1993) (en banc).

Not only did the trial court fail to explain that Magleby could only be convicted if he intended a true threat of imminent lawless action or to cause fear of such action, it told the jury that "oppress, threaten, or intimidate" should be understood in their "ordinary" meaning, that to threaten or intimidate does not require the possibility of physical force or harm, and that an intent to harass was sufficient to establish the felonious conduct. Although the Tenth Circuit admitted that these instructions were "flawed" under § 241, it failed to observe that the judge repeated them when he later explained § 3631 to the jury. Pet App. 8a-14a, 87a, 94a-95a. A more prejudicial misstatement of First Amendment requirements under this Court's precedents, existing both at the time of trial and the direct appeal, is difficult to fathom.

4. Failure to Argue Whether Fire Is Used to Commit a Conspiracy

That fire is not used to conspire should be obvious. There is no need to let this issue 'percolate' as the question involved is not a subject of intense legal debate, even though the Government still insists that it can seek ten year penalty enhancements for **both** the underlying charge and a conspiracy to commit the underlying charge, which has real-world consequences for numerous defendants, including Magleby. This illustrates the meritoriousness of the omitted issue for the Petitioner, and therefore the ineffectiveness of appellate counsel involved, in addition to being a question of importance because of the practical impact.

The trial judge hit the nail on the head when he observed that "just plain common sense tells me that you haven't used fire in reaching an agreement. I can't even get my mind there on it. You don't use fire to reach an agreement, even though the agreement anticipates the use of fire." Pet. 29. The judge **never** repudiated this sentiment, nor did he "determine[ ] the petitioner's argument was

mistaken" as the Government erroneously claims. Pet. Opp. 9, fn. 7. The judge acknowledged a few minutes later that his initial legal research was mistaken because "I was looking at Section 371 on conspiracy...Frankly, it appears to me that it makes Mr. [Leland] Jorgensen's argument about the legality, the legal propriety, of Count 3 a little stronger. But we'll take it up at sentencing and hopefully get this whole thing sorted out at sentencing. I didn't want to leave you with that misadvice." Pet. App. 108a-109a.

Conclusion - Certiorari is Appropriate Here

An unfortunate byproduct of the lack of specificity from this Court as to what constitutes "ineffective assistance of appellate counsel" is that the bright-line rule in *Evitts*, (that when an appellate counsel defaults on an appeal, it constitutes a denial of due process and therefore ineffectiveness), has become the overarching concern by the appellate courts, to the exclusion of all other elements of effective appellate advocacy. But the only incentive that exists under this Court's precedents is for appellate courts to insist that a likely incompetent attorney, even one who has repeatedly missed deadlines and disregarded procedures, provide some sort of brief, no matter how inadequately the attorney presents the obvious, well-preserved issues. *See* Affidavit of Magleby's Trial Counsel, Pet. App. 110a-118a. This case provides an excellent opportunity for this Court to establish standards for effective appellate counsel.

PAUL VICTOR JORGENSEN
Counsel of Record for Petitioner
215 West Main Street, P.O. Box 850
Middletown, Maryland 21769
(301) 293-6822

MICHAEL WEIN
Attorney for Petitioner
7829 Belle Point Drive
Greenbelt, MD 20770
(301) 441-1151